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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

SANDY M. CROCKER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF CLALLAM COUNTY, STATE OF WASHINGTON Clallam County Superior Court No. 20-1-00301-05

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

- 1. Whether the comment that "a transaction of drugs for money occurred" was not reversible error when the comment was objected to and the court ultimately sustained the objection on grounds of lack of personal knowledge and the jury was properly instructed?
- 2. Whether the conviction should be affirmed because the comment was harmless beyond a reasonable doubt?

II. STATEMENT OF THE CASE

The State charged Crocker with Delivery of a Controlled Substance, Methamphetamine in Counts 1, 2 and 3 all with a special allegation the crime was committed in or on certain public facilities. CP 106–08. In Count 4, Crocker was charged with Possession of a Controlled Substance with Intent to Deliver Methamphetamine. CP 108.

The matter went to trial and on June 16, 2021, the jury found Crocker guilty of Counts 2 and 3 and not guilty on Counts 1 and 4. CP 25. The jury also found Crocker guilty of the special

allegation in Counts 2 and 3. CP 76, 78. The trial court sentenced Crocker to the low end of the range of 12 months and a day plus 24 months for the public place enhancement for a total of 36 months on each of Counts 2 and 3 to be served concurrently. CP 28–29.

Agent Daniel Janikic, United States Border Patrol, testified as the State's first witness. RP 229. Janikic had worked for the Olympic Peninsula Narcotics Enforcement Team (OPNET) from April 2019 to January 2021. RP 229. RP 230. While with OPNET, Janikic's varied duties included writing up wire orders to record conversations, writing up search warrants, operation planning, and taking pictures and video recordings of the areas that they searched. RP 230. Janikic was also responsible for working with several confidential informants (CIs). RP 230.

Janikic testified that a CI is someone that is willing to work with OPNET to purchase controlled substances or provide information on people who are selling controlled substances in return for leniency on their case or for the sake of helping

OPNET get drugs off the street. RP 230. Sometimes CIs come to OPNET and sometimes OPNET talks to people in the jail to see if they are willing to work for OPNET to get leniency on their cases. RP 231. The CI in this case, Emily McCallister, formerly Emily Beedle, came to OPNET on her own. RP 232.

In order to get someone who deals drugs to sell to a buyer, the buyer needs to be known in the drug game. RP 233. Buyers that have purchased drugs in the past have more credibility than people a seller doesn't know. RP 233. For this reason, it is not uncommon for CIs that purchase drugs from drug dealers for OPNET have a history with drugs and a criminal record. RP 234. It was common for OPNET to utilize informants who know the people they are buying from. RP 284.

McCallister, the CI in this case, was first introduced through the testimony of Agent Janikic. RP 229, 234–35. At the time Crocker was being investigated, McCallister was working as a paid confidential informant. RP 235. Janikic testified that paid CIs are compensated in various ways including gas money,

phone cards, and sometimes a pre-determined amount of money for every successful buy they do. RP 235.

When asked on direct examination how much money McCallister was paid for controlled buys from Crocker, Janikic testified that he believed it was \$100.00 for each purchase she did with Crocker. RP 235, 244. McCallister, testifying the next day of the trial, was not asked on direct examination if she was paid. RP 332. On cross examination did not remember exactly how much she was paid but when the defense asked her if \$100 per controlled buy was familiar, McCallister replied "Yes." RP 381.

McCallister testified that she is a recovering addict and also that she knew people involved because she used to be on the streets. RP 340. McCallister was the person that brought Crocker to the attention of OPNET as someone who sells controlled substances at Maloney Heights Apartments. RP 232, 234. McCallister knew Crocker for five years as well as her significant other Sean Erickson. RP 378. Erickson was present for the first

buy in the apartment on March 26 but not the other buys. RP 378.

McCallister testified that she got along with Crocker but she did the buys because she believed "Sandy is better than what she's doing now and it needs to come to a stop." RP 379. McCallister testified that she felt her participation with OPNET was important "[b]ecause it's helping people who don't need the drugs to get off the streets and get off of them. And some people, dealers are giving people drugs that don't need them. That's not right." RP 379.

Controlled Buys

Janikic testified that OPNET formulated a plan to have McCallister purchase drugs three times from Crocker. RP 235. Janikic testified that three purchases was typical for an OPNET operation because it shows a pattern that the target is not a onetime only seller, that they have sold on more than one occasion to the informant and it helps build the case. RP 235–36.

Janikic described the process for a controlled buy. RP 236. First OPNET meets with the CI at an undisclosed location where

no one is around so OPNET can search the CIs vehicle and search the CI to make sure the CI doesn't have any controlled substances on their person or in their vehicle. RP 236. This is to make sure when the CI provides the purchased drugs to OPNET, that it is more than likely the CI purchased the drugs from the target. RP 237. On cross examination, when asked whether any of the pre and post buy searches were strip searches, McCallister answered, "No." RP 382–83.

Typically, OPNET has a couple pairs of officers to do the search, one pair to search the vehicle, and another to search the CI. RP 238. The pair that searches the vehicle then gets into position to protect the CI. RP 238. The pair of officers that stayed behind with the CI follow the CI to the location while trying to stay out of the way in order to not be too visible. RP 238.

Maintaining view of the CI is not always possible so OPNET also provides CIs with a recording device to record conversation. RP 239.

Next, OPNET keeps the CI and their vehicle in view as much as they possibly can and they leave the undisclosed "control area" and drive to the location where the controlled substances exchange is going to take place. RP 237. The CI then meets with the supplier or dealer and the exchange occurs there. RP 237. After the exchange, OPNET and the CI will return to the predetermined secure location where the CI will provide the purchased controlled substances to the case agent, Janikic in this case. RP 239. Then OPNET searches the CI and the vehicle again for controlled substances. RP 239–40.

March 26, 2020 first controlled buy (Count 1)

The first controlled buy using McCallister as a CI was on March 26, 2020. RP 241. McCallister contacted Crocker and set up a meeting with her on March 26. RP 241. Prior to the meeting with Crocker, OPNET searched McCallister and her vehicle, McCallister drove to Maloney Heights Apartments and went inside the building. RP 242. OPNET was not able to have any visual of McCallister or the buy while McCallister was in the

apartment building. RP 242.

After McCallister came back out, she went back to the assigned meeting location and provided the controlled substances she purchased that appeared to be methamphetamine to Janikic. RP 243. OPNET searched McCallister and her vehicle and found no other controlled substances. RP 244. The controlled substance was then packaged and secured and then sent to the Washington State Laboratory where the item was tested by Forensic Scientist James Daily. RP 247, 249, 417 (exhibit no. 6). Daily found that "[t]here was 1.76 grams of white crystal material that was found to contain methamphetamine." RP 417. OPNET did not use a recording device on the March 26 controlled buy. RP 251.

April 1, 2020 second attempted controlled buy

OPNET attempted to complete a second purchase of controlled substances from Crocker on April 1, 2020. RP 250. This purchase was not successful as McCallister would later

testify that Crocker did not have any product to sell that day. RP 250, 341–42.

April 13, 2020 controlled buy (Count 2)

The next attempt to purchase controlled substances from Crocker occurred on April 13, 2020 and OPNET utilized a recording device or wire. RP 251–52. Janikic completed the wire order which the Court authorized so that OPNET could record conversation between McCallister and Crocker. RP 251–52. In this controlled buy, the recording device successfully recorded conversation between the two. RP 252.

Prior to starting the recording OPNET searched McCallister and Detective Pickrell and Agent Danowitz searched her vehicle and didn't find any controlled substances. RP 253-54, 287–88. Then Janikic started the recording and introduced himself and what the plan was and then gave McCallister the device which she put in her sweatshirt pouch. RP 252–53.

Janikic then testified as follows:

Q So, once these searches were completed and once the recording was enacted, what happened next?

A Once the search is completed and once the recording has started, the confidential informant will place that recording device in their pocket and then they will drive to the agreed upon meeting location. They go to that meeting location, OPNET detectives will follow, just as we do on any other case and then they -- the transaction takes place.

. .

Q So, where did the confidential informant go after leaving the undisclosed location?

A The confidential informant went to Maloney Heights.

Q And did the transaction take place immediately or shortly thereafter when she got to Maloney Heights?

A Yes. The -- Ms. Crocker came out of the apartment, met the subject, sorry, met the confidential informant in her vehicle to where the transaction took place.

Defense counsel objected, "This is stating his opinion on which is ultimately for the trier of fact." RP 254. The court responded, "So, he think you can describe what he has personal knowledge of, because that's how I'll rule." RP 254.

Then the prosecution began asking about the beginning of the April 13th controlled buy between McCallister and Crocker,

"So, just to go back a moment. Did the confidential informant and Ms. Crocker go anywhere else?" RP 255. Janikic testified, "They did. After they went to Maloney -- after Ms. Crocker got into the confidential informant's vehicle, they went to an area near Swayne's and the tree park area and that's where they drove to." RP 255. Detective Pickrell observed as McCallister and Crocker went to this area. RP 288.

Pickrell watched as Crocker got out of the vehicle and walked right behind his vehicle towards Swayne's and he watched her come back and McCallister remained in the vehicle.

RP 289.

OPNET detectives followed them back to Maloney Heights. RP 255. When they got back to Maloney Heights, Crocker got out of the vehicle and went into her apartment and then a few minutes later she returned back to McCallister's vehicle. RP 256. Pickrell later testified that he witnessed McCallister stay in the vehicle as Crocker went back to her apartment and returned to the vehicle moments later. RP 290.

The prosecution then asked, "And after that, what happened next?" RP 256. Janikic replied, "What happened then was an exchange of controlled substances took place for money." RP 256.

Defense counsel objected again and the court stated, "Again, he can testify to what he has personal knowledge of." 256. The following exchange occurred:

MR. COMMEREE: The objection is sustained because he doesn't have personal knowledge? I mean --

THE COURT: Well, --

MR. SNIPE: Well, I think we can move past this point and simply go onto the narrative.

THE COURT: Okay. Well, let me say this. I'm not quite sure what your objection was, but I think he needs to limit his testimony to things he has actual personal knowledge of not speculating as to what happened. He wasn't there. Isn't that what you're objecting to?

MR. COMMEREE: Correct. So, the State --

THE COURT: So, I guess I sustain in that sense.

RP 256.

Then Janikic continued and testified that after Crocker left,

McCallister drove back to the undisclosed site to meet with

OPNET where McCallister got out of the vehicle and handed him

"a small bag of what looked like methamphetamine." RP 257. After securing the small bag of methamphetamine, McCallister and her vehicle were searched again and no controlled substances were found. RP 257. Detective Pickrell testified that after Crocker left McCallister's vehicle, McCallister returned to the undisclosed location where he searched her vehicle again. RP 291.

Janikic had the suspected methamphetamine sent to the Washington Crime Laboratory. RP 263. Forensic expert Daily testified later that the bag contained about 1.70 grams of white crystalline material containing methamphetamine. RP 422.

Janikic was then asked about Plaintiff's Exhibit Number 11 and Janikic stated that it was a CD of the recording of the buy that occurred on April 13, 2020. RP 260. Janikic stated that he knew the CD was a recording of the buy because he listened to it earlier that day and signed the CD. RP 260. Janikic testified that he was confident that it was an accurate copy of the recording and that the source of the recording was the recording device he

gave to McCallister for the April 13 controlled buy. RP 261.

McCallister was provided the money from OPNET but it was never recovered *See* RP 273–74. Janikic did not expect to recover the money because an immediate arrest was not intended as OPNET does three buys and then waits a while to make an arrest to protect the CI. RP 277, 78.

Janikic testified on cross examination that he did not see the transaction occur in McCallister's car as he was parked just down the street from Maloney Heights. RP 275.

McCallister's Testimony

While testifying in regards to count II, McCallister stated she was wearing a wire for the controlled buy that occurred on April 13. RP 342. Prior to the controlled buy, McCallister drove her mom's vehicle to meet with OPNET and she and her mom's vehicle were searched for controlled substances and none were found. RP 344, 351. OPNET provided McCallister with money to purchase methamphetamine from Crocker. RP 344.

The wire recording was played for the jury while

McCallister was on the stand. RP 344. McCallister testified that after she was searched and provided money for the controlled buy, she drove back to Maloney Heights where she met up with Crocker. RP 345. Crocker told McCallister that they had to go somewhere else so she could pick up methamphetamine from her supplier because she was currently out. RP 346.

McCallister drove to a tree park behind a store in Port Angeles, WA, known as Swayne's. RP 347. Then after she parked, they sat there for what seemed like forever before Crocker meet with another person. RP 347. The State played the wire recording during the time that they were waiting RP 348. Crocker eventually asked McCallister how McCallister was doing on time and McCallister stated "I've got a little bit longer." RP 349; Supp. RP 5 (filed 4/25/20). McCallister testified that Crocker got out of the vehicle to go get popcorn at Swayne's but there was none available due to Covid. RP 350. The wire revealed that Crocker mentioned that if the car was her own she would sit in the car with McCallister for a long time. RP 351;

Supp. RP 6.

McCallister could be heard on the wire stating, "Man, sure it's not like he's dying for the money (indiscernible) help you out with what you owe towards him and whatever you have." RP 353; Supp. RP 8. McCallister clarified that she made that comment because "Sandy was able to get fronts from her person. And so, she owed him at the time and so with me going through her to get some product, it was helping her pay off what she owed him." RP 353. McCallister testified that "fronts" means that Crocker's person would give Crocker drugs without requiring money. RP 353. Crocker could be heard saying on the wire that she was the only one her person fronts to. RP 353–54; Supp. RP 8. Crocker claimed that she is the only one her person works with and clarified "that he fronts to." RP 353; Supp. RP 8. McCallister stated that "Right yeah not too many people will always pay. RP 354; Supp. RP 8. Crocker affirmed "I'm the only one he can trust to do that." RP 354; Supp. RP 8.

Eventually, Crocker's supplier finally showed up. RP

354–55; Supp. RP 9. Crocker got out of McCallister's vehicle and went to her supplier's vehicle. RP 355. The wire recording was played again for the jury and the prosecutor asked McCallister, "And when you say here's \$100, at that time, did you provide Ms. Crocker any money?" RP 356. McCallister stated that she did and that the money was for the purchase of methamphetamine. RP 356. McCallister could be hearing saying on the wire, "Okay. There's \$100 right there." Supp. RP 9. After Crocker returned to McCallister's vehicle the two could be heard on the wire as follows:

TFI 1911: Damn girl, you're quick.

MS. CROCKER: Well, well, (indiscernible). I told him that I have \$60, right?

TFI 1911: Uh-huh.

MS. CROCKER: And then I said but I have another \$20.

TFI 1911: Mm-hmm.

MS. CROCKER: To go on top of what I owe you. And then he still only gave me a ball.

TFI 1911: Okay.

MS. CROCKER: So, --

TFI 1911: If you want, just half it.

MS. CROCKER: Okay. And then I'll just owe you then?

TFI 1911: Yep.

MS. CROCKER: Okay. And he didn't have another bag, so I'll just have to half it at the house.

Supp. RP 10.

McCallister explained that she and Crocker were talking about splitting the methamphetamine between the two of them. RP 358–59. McCallister mentioned that she thought a "ball" is 3.75 grams of methamphetamine. RP 360. They returned to Maloney Heights. RP 357.

After the two returned to Maloney Heights, Crocker took the methamphetamine upstairs to divide it up while waited in the car. RP 360. McCallister waited in the car. RP 360. When Crocker returned, she handed McCallister what she purchased and went back upstairs. RP 360. McCallister believed that she purchased a Tee of methamphetamine which is half a ball. RP 360.

McCallister drove back to OPNET and provided them the methamphetamine that she purchased from Crocker. RP 361. Then OPNET searched McCallister and her mom's vehicle again and no controlled substances were found. RP 361.

In regards to the April 13 buy, Detective Powless took pictures of Crocker and he saw her get out of McCallister's car and walk into Swayne's. RP 398–400.

May 12, 2020 controlled buy (Count 3)

Agent Janikic testified that the third controlled buy occurred on May 12 and OPNET searched McCallister and her vehicle again and no controlled substances were found. RP 265. A recording device was also used again and the attempted purchase was recorded. RP 265. Janikic activated the recording device and identified himself, the CI, the subject of the target, what they were looking to purchase and handed the device to McCallister. RP 266. McCallister then drove to Maloney Heights and OPNET followed. RP 266. OPNET maintained visual contact with McCallister the entire time. RP 266.

Crocker came to McCallister's vehicle and they met for a few moments. RP 266. This meeting was captured on video by Det. Grall who participated in this buy with OPNET. RP 326. Det. Grall identified Crocker as approaching McCallister's car.

RP 326. Grall testified that he did not see the exchange of controlled substances. RP 330.

After Crocker left the vehicle, McCallister and OPNET returned to the undisclosed location and McCallister provided OPNET a small bag with what looked like methamphetamine. RP 267. OPNET then searched McCallister and her vehicle and found no controlled substances. RP 267. The suspected methamphetamine was sent to the Washington Crime Laboratory for testing and Forensic Scientist Daily found that "[t]here was 3.50 grams of white crystalline material that was found to contain methamphetamine." RP 269, 427.

McCallister's Testimony

McCallister also testified about the controlled buy on May 12 which was also recorded with a wire. RP 362. McCallister testified that Janikic activated the recording device. RP 363. McCallister was driving her friends Toyota Camry that day. RP 364. The vehicle was searched and she was searched and no controlled substances were found. RP 364. McCallister drove to

Maloney Heights and Crocker came out and met McCallister in her vehicle. The State played Exhibit 34 which was identified as the recording of the event. RP 363, 366. McCallister gave Crocker all the money she was provided by OPNET to Crocker and Crocker gave McCallister methamphetamine in return. RP 368. The transaction between McCallister and Crocker for methamphetamine took place in McCallister's car just as it did for the April 13 (second) and March 12 (third) controlled buys. RP 367.

Just before the transaction occurred, McCallister testified on direct:

Q Do you recall if you saw anyone else on this date?

A Not to do with the deal, no. Someone came up and asked for a cigarette and that was it.

Q And did you give him a cigarette?

A I did.

Q Did that person give you anything?

A No.

Q Did you know that person?

A Yes.

Q Do you recall who it was?

A No, I don't.

Q Did anything of significance happen besides giving him a cigarette?

A No.

RP 368-69.

McCallister identified her voice and Crocker's on the recording and stated she was asking if Crocker had tested her white (methamphetamine) with fentanyl because white at that time was being laced with fentanyl. RP 375–76.

TFI 1911: Okay. So, I have \$100 total. I was gonna give you \$80 for white and then \$20 for dark, but since Sean is not, whatever, don't have --

MS. CROCKER: Yeah, he doesn't --

TFI 1911: -- anything.

MS. CROCKER: -- he won't have anything until later.

TFI 1911: I got \$100 for you for some white.

MS. CROCKER: Okay.

TFI 1911: So, there is \$100 there.

MS. CROCKER: Yeah and here's this.

. . .

MS. CROCKER: All right.

TFI 1911: So, it doesn't matter how much, couple points and more, actually, cause she wants to kind of stockpile and that way she doesn't have to go back out and buy some more. So, --

MS. CROCKER: All right. All right.

TFI 1911: Yeah.

MS. CROCKER: I'll let him know. Cause he's waiting, basically, he's waiting for –

TFI 1911: So, is this -- is this wow, that's a big chunk. Is this decent stuff?

MS. CROCKER: Yeah, well if it's the same stuff that I have.

TFI 1911: Okay.

MS. CROCKER: Yeah, I have -- you pretty much --

TFI 1911: Have you tested your stuff yet for fentanyl?

MS. CROCKER: Um no, I haven't tested James' but I have the thing to do it and I keep telling myself I'm going to.

TFI 1911: Make sure it's the residue. I got to get some more strips.

MS. CROCKER: I know has to do the stuff that's left in the bag, I know.

TFI 1911: Yep.

Supp. RP 17-18 (filed 4/25/2020).

Soon after, Crocker got out of the vehicle and McCallister went back to the meeting point to meet with OPNET. RP 376. McCallister gave the suspected methamphetamine she purchased from Crocker to Janikic and she and her vehicle were then searched and no controlled substances were found. RP 367–77.

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September 20, 2020 arrest (Count IV)

Crocker was arrested later in order to help provide anonymity to the CI (McCallister). RP 270.

Officer Luke Brown, Port Angeles Police Department (PAPD), was on duty on Sept. 20, 2020 and had probable cause to arrest Crocker. RP 435. Brown received a call from dispatch that Crocker was walking around the area of Swayne's. RP 435. Brown called out to Crocker and he explained to her that he had probable cause for her arrest. RP 436. Crocker asked if she could give her purse to her friend and Brown said no because she was wearing it. RP 436. Crocker's friend left quickly left the area. RP 436.

Brown read Crocker her Miranda rights and then searched her purse incident to arrest. RP 437–38. Luke testified that the found four baggies of methamphetamine in her purse. RP 438. Brown weighed the baggies of suspected methamphetamine at 11.9 grams. RP 441. Brown checked the methamphetamine in

evidence and it was sent to the Washington Crime Laboratory to be examined. RP 440–42.

Forensic Scientist Daniel Van Wyk tested one of the four baggies (R 446–47) and concluded that the substance he tested was methamphetamine. RP 450.

III. ARGUMENT

A. THERE WAS NO ERROR BECAUSE THE TRIAL COURT ULTIMATELY SUSTAINED THE OBJECTION TO AGENT JANICIK'S COMMENT THAT AN EXCHANGE OF DRUGS FOR MONEY OCCURRED AND THE JURY WAS CORRECTLY INSTRUCTED TO DISREGARD THE COMMENTS.

Here, the relevant testimony for the first objection is as follows:

Q And did the transaction take place immediately or shortly thereafter when she got to Maloney Heights? A Yes. The -- Ms. Crocker came out of the apartment, met the subject, sorry, *met the confidential informant in her vehicle to where the transaction took place*.

RP 254.

The court ruled in regards to the first objection as follows:

MR. COMMEREE: Objection, this is stating his opinion on which is ultimately for the trier of fact.

THE COURT: So, he think you can describe what he has personal knowledge of, because that's how I'll rule. So, --

RP 254.

The next objection occurred not long after as follows:

A Once they got to Maloney Heights, Ms. Crocker got out of the vehicle, went into her apartment and a few moments later she then arrived back to the confidential informant's vehicle.

Q And after that, what happened next?

A What happened then was an exchange of controlled substances took place for money.

MR. COMMEREE: Objection.

THE COURT: Again, he can testify to what he has personal knowledge of.

A So, after the --

MR. COMMEREE: The objection is sustained because he doesn't have personal knowledge? I mean –

RP 256.

The court sustained the objection due to lack of personal

knowledge:

THE COURT: Okay. Well, let me say this. I'm not quite sure what your objection was, but I think he needs to limit his testimony to things he has actual personal knowledge of not speculating as to what happened. He wasn't there. Isn't that what you're objecting to?

MR. COMMEREE: Correct. So, the State --

THE COURT: So, I guess I sustain in that sense. RP 256.

1. The State concedes that the statement that an exchange of drugs for money occurred was likely improper.

Generally "opinions, particularly expressions of personal belief, as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses" are inappropriate in criminal trials. *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (citing *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007)).

"Whether testimony constitutes an improper opinion on guilt is a highly fact specific determination that necessarily rests on the specific circumstances of each case, including "(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact." *State v. Hudson*, 150 Wn.

App. 646, 653, 208 P.3d 1236 (2009) (citing Montgomery, 163 Wn.2d at 591, 183 P.3d 267).

Here, Janikic is a law enforcement officer, *State v. Kirkman*, 159 Wn.2d at 928 (police officer's testimony may carry special aura of reliability), and the charges were for delivery of controlled substances so the statement did go to a central issue in the case where the defense was that Crocker simply didn't do it. Additionally, the nature of the testimony was not an inference "drawn from facts directly perceived by the witnesses' senses[]" because Janikic did not witness the transaction because he was parked down the street from Maloney Heights. *See State v. Blake*, 172 Wn. App. 515, 529, 298 P.3d 769 (2012).

The last factor to consider is the other evidence in the case but this will be discussed in relation to whether there was any prejudice from the statement at issue.

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2. There was no error because the statement was objected to and the court sustained on grounds of lack of personal knowledge and the jury was properly instructed.

The ruling to the first objection, although incomplete without "overruling" or "sustaining" was correct in the sense that it instructed what was admissible and what was not—the testimony must be based on personal knowledge. *See Blake*, 172 Wn. App. at 523 (citing *Heatley*, 70 Wn. App. at 578, 854 P.2d 658. ("[T]testimony that ... is based on inferences from the evidence is not improper opinion testimony."); *see also Montgomery*, 163 Wn.2d at 591 (citing ER 701) ("Lay witnesses also may now give opinions or inferences based upon rational perceptions that help the jury understand the witness's testimony and that are not based upon scientific or specialized knowledge.").

The trial court's ruling was clarified further when the court *sustained* counsel's objection to what was substantially the same testimony by Janikic.

Further, on cross examination, Janikic testified that he did not see the transaction, and thus did not have personal knowledge, because he was parked down the street from Crocker's apartment and McCallister's vehicle.

Therefore, the jury was informed that Janikic's statement was not admitted. On closing, defense counsel reminded the jury, "All the other officers know and admitted they weren't able to see any transaction. They didn't see any -- did not see her hand anything and she did not see Ms. McCallister - Beedle hand money over to her." RP 532.

Finally, "[i]mportant to the determination of whether opinion testimony prejudices the defendant is whether the jury was properly instructed." *Montgomery*, 163 Wn.2d at 595 (citing *Kirkman*, 159 Wn.2d at 937). Juries are presumed to have followed the instructions they are given. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001) (citing *Degroot v. Berkley Constr., Inc.*, 83 Wn. App. 125, 131, 920 P.2d 619 (1996)).

Here, the court instructed the jury, "If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict." RP 84. "You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions." RP 85.

In summary, Janikic's statements were objected to and the court ultimately sustained the objections for lack of personal knowledge and the jury was properly instructed to disregard it. For this reason, Crocker fails to establish any error and any prejudice from the statements.

This Court should affirm.

B. THE ALLEGED ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

"Impermissible opinion testimony regarding the defendant's guilt may be reversible error because such evidence violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury."

State v. Kirkman, 155 P.3d 125, 130, 159 Wn.2d 918, 927 (2007) (citing State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987)).

Here, Agent Janikic's testimony was objected to and the court ultimately sustained it on grounds of lack of personal knowledge. Further the court properly instructed the jury. Therefore, the testimony was not admitted and there was no resulting prejudice.

Nevertheless, "A constitutional error is harmless if the State can establish beyond a reasonable doubt that any reasonable finder of fact would have reached the same result in the absence of the error." *State v. Wethered*, 110 Wn.2d 466, 474, 755 P.2d 497 (1988).

Here, although Janikic didn't personally witness the exchange, he was the case agent and drew up with the plan for McCallister and knew that the purpose of the controlled buy was to purchase controlled substances from Crocker. Janikic was present when McCallister was searched and her vehicle was

searched by Det. Pickrell and it was confirmed that no controlled substances were found.

Janikic activated the recording device and identified the recording as an accurate recording of the transaction. Crocker could be heard saying on the wire that she would just need to divide the ball of methamphetamine in half at the house after they returned from Swayne's. *See* Supp. RP 10. Detective Pickrell witnessed that *McCallister stayed in her car the entire time*.

Pickrell observed as Crocker went back into her apartment to divide the methamphetamine as she said she intended to do. He witnessed Crocker come back out minutes later to meet with McCallister at her vehicle before McCallister left to return to the designated meeting point. McCallister then handed Janikic the baggie of suspected methamphetamine.

McCallister was searched again and no controlled substances were found. The baggie of suspected methamphetamine was sent to the crime laboratory and tested positive for methamphetamine and was pretty close to half a ball

(3.75 grams) weighing in at 1.71 grams verifying Crocker's statement that she would divide the ball when she got back home.

McCallister's testimony was corroborated by all of the above. She also testified that Crocker exchanged the methamphetamine for money with her while she was in her vehicle. McCallister's credibility is not subject to review. *State v. Mashek*, 177 Wn. App. 749, 756, 312 P.3d 774 (2013) (quoting *State v. Liden*, 138 Wn. App. 110, 117, 156 P.3d 259 (2007)).

Therefore, the evidence within the confines of the controlled buy was very strong considering McCallister's testimony, the wire recording with Crocker's direct statements regarding the ball of methamphetamine and her intent to divide it, Pickrell's direct observations from and back to the meeting point, Janikic's receipt of the suspected methamphetamine directly from McCallister and the laboratory results confirming the substance as methamphetamine.

This evidence presents a very strong case such that it is beyond reasonable doubt that the jury would have come to the same guilty verdict absent the comment at issue.

This is further evidenced by the fact that the jury came to a guilty verdict without the objectionable comment in regards to Count III for the May 12th controlled buy. The evidence of the May 12th controlled buy was similar to the April 13th controlled buy except that the wire recording for May 12 did not include as *direct* a statement by Crocker regarding her intent to provide methamphetamine to McCallister.

Key to the convictions both the April 13 and May 12 are the facts that that McCallister never got out of her vehicle and that there were wire recordings. This can be seen from the fact that the jury acquitted on Count I as McCallister went into the Crocker's apartment where the transaction allegedly occurred without a wire.

Finally, are argued above, the court sustained the objection to Janikic's statement on grounds of lack of personal knowledge

and the jury was properly instructed to disregard evidence not based on personal knowledge. All of the above shows that, beyond a reasonable doubt, the jury would have reached the same result in the absence of the error.

Therefore, this Court should affirm the conviction on Count 2.

IV. CONCLUSION

The defense objected to Janikic's testimony that a transaction of drugs for money occurred in McCallister's vehicle and the court ultimately sustained the objection due to lack of personal knowledge. Janikic testified before the jury that he didn't see the transaction because he was parked down the street. Furthermore, the trial court properly instructed the jury to disregard inadmissible evidence.

Therefore, there was no error and no prejudice resulting from Janikic's statement.

Finally the strength of the case was overwhelming due to Crocker's statements captured in the wire recordings which

amounted to admissions to the crime in addition to all the other evidence argued above. Therefore, the alleged error would have been harmless beyond a reasonable doubt.

For all the foregoing reasons, this Court should affirm the conviction for Delivery of a Controlled Substance in Count II.

This document contains 6,166 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 4th day of August, 2022.

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CERTIFICATE OF DELIVERY

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically to Kathryn Russell Selk on August 4, 2022.

MARK B. NICHOLS, Prosecutor

Jesse Espinoza

CLALLAM COUNTY DEPUTY PROSECUTING ATTORN

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